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Occupational safety and health: the employers' perspective

David Farlow*

In this discussion of the principles and objectives for proposed occupational health and safety legislation, I shall draw quite heavily on the public discussion paper put out in June 1988 by ACOSH, *Occupational safety and health reform*. The statements in that report remain true. Further, it is important to realise that the recognition of these problems provides the prime rationale behind the desire for reform.

The present problems as experienced by employers result at least as much from the fragmented and inconsistent administrative process as from the difficulties with the existing legislation. Thus, the driving force for reform is aimed at the administrative arrangements, while recognising that, in order for such changes to occur, significant legislative changes would be necessary. In addition, there exists the opportunity to tidy up the legislative mess that currently exists - but this must be done properly because a missed opportunity now will lose the momentum towards reform and bad new legislation will be very difficulty to alter, giving us different problems for some time to come.

Present problems

Firstly, there is too much legislation at present. Moreover, it is not just the amount of law but the way it is spread over so many different enactments and administered in different departments that causes the difficulties. Many of the present laws relating to occupational health and safety are contained in legislation primarily dealing with other matters and so those wishing to find out and carry out their obligations have difficulty in doing so. This means that the law can be far less effective than is imagined or required because people have difficulty in finding out what laws actually apply to their work.

This problem is compounded by the lack of knowledge in some departments of laws administered by other government agencies. As an example, an employer in Auckland who wished to expand his business asked a representative of one government agency what legislation covered this proposed new issue. The employer was referred to another government agency. After being passed round no fewer than seven officials, he was told to ring another senior official in Wellington. In frustration he rang me - but sadly I had to tell him that the legislation about which he was enquiring was in fact administered by yet another government agency!

Perhaps the reason for this problem with legislation is in fact the way in which it has developed in a piecemeal fashion over the last 100 years or so. Even when you finally

* Occupational health and safety adviser, New Zealand Employers Federation. Member, Advisory Committee on Occupational Safety and Health

track down the piece of legislation you are after, it is found that the law is often overly complex and far too detailed to be properly understood by those who have to follow it in a practical way in the workplace. Because technical details have often been included in present acts and regulations, the existing law may be outdated or even irrelevant due to changes and improvements in technology. Because these details have been incorporated in legislation it can be extremely difficult and time consuming to have these amended.

The emphasis of existing legislation can vary depending on its age. Some legislation is especially prescriptive, setting down exact details required to fulfill certain standards, other legislation is more permissive. Some legislation concentrates solely on standards for the physical environment, elsewhere there is more emphasis on organisational factors and systems of work. Again the present law treats different hazards differently depending on the industry, and the law does not treat workers or workplaces equally.

It has to be said in fairness that not all employers would perceive these problems as being equally serious. Many in industries which have industry-specific legislation are not exposed to the problems listed above to the same extent as are those in, say, the manufacturing industry. Nevertheless, I believe the case for reform is sufficiently strong in itself because of the large number of legislative and administrative anomalies.

Solutions

It is of course comparatively easy to identify problems - but maintaining a consistent approach when proposing solutions is sometimes more difficult. We should not fall into the trap of proposing piecemeal solutions to problems that have arisen in this fashion.

I also think it is very important for us to consider what can be achieved by legislation. In other words, how effective is the law of itself? I believe it is wrong to assume that merely passing laws actually makes a great deal of difference in matters such as health and safety. It is the creation of the right environment that is important. I am not saying there should be no laws at all - there must be the proper framework, but I believe we should not get the idea that the law itself can do what is wanted.

Similarly, government agencies have a role to play and should not abdicate their responsibility to other groups. But an army of government inspectors acting as policemen will not achieve the desired results either. There should be more emphasis on the government's role in providing education, information and training.

When considering reform or new legislation in New Zealand there is always the desire to see what is being done overseas. However, it seems to me that we often get it wrong. We either slavishly follow what has been done overseas, and ignore the mistakes and problems that may have occurred, or we seek to add to overseas legislation so that we can "lead the world". It is often not recognised that legislation develops in a particular political, social and economic climate which may be special to a particular country and not relevant to New Zealand. Worst of all perhaps is the tendency to select "bits" out of various pieces of overseas legislation and hope they fit together in the New Zealand situation. Often they do not. Surely the correct approach, if we are going in any way to base what we do on overseas experience, is to make sure a situation is also relevant to New Zealand and that we do not copy someone else's mistakes. We also need to avoid the favourite pastime of re-inventing the wheel.

So, what principles should guide us in producing new legislation? I would suggest the following:

- Occupational health and safety is a management responsibility. It should be a line management responsibility and treated as such.

- But occupational health and safety is an issue that involves everyone in the workplace and the workforce and so workers need to be involved both individually and collectively in maintaining safe and healthy conditions in the workplace. Safety is everyone's responsibility.

- The government has a role to play in setting and enforcing uniform and consistent standards.

- Appropriate preventative strategies should recognise all factors involved in accident causation including systems of work and human factors.

- There needs to be recognition by the Government of the need to involve employers and employees and their representatives at national level.

Having given the main principles which should guide the reform of legislation, now let us look at the possible nature of that reform. Firstly, the structure of the legislation, which I believe should be in a three tier structure, comprising:

- A single act stating general principles, rights and responsibilities and establishing the right framework.

- Regulations under the act dealing with particular hazards and setting standards for performance.

- Codes of practice setting out recommended practices.

This is a deliberately graduated structure which is in marked contrast to the present set-up where several acts contain prescriptive detail and regulations contain technical detail.

If the act is to fulfil the requirements outlined it will have to:

- Have universal coverage.

- Be of an umbrella or enabling nature and not contain prescriptive detail.

- Establish clear new administrative arrangements.

By having universal coverage all workers would be covered and by the same standards, no matter what industry. It would also mean that any new industry would be covered and no new acts would be needed. Describing a new act as 'enabling' or 'umbrella' means that the act, as well as stating general principles, rights and responsibilities, would establish the framework for developing, implementing and enforcing standards.

One would expect to see such phrases as 'as appropriate to the workplace' and 'as prescribed by regulation' appear frequently in a single new act as issues are covered in principle but not in detail. This provides the flexibility for regulations to be introduced as and when and in whatever circumstances are deemed appropriate without automatically applying across the board when this may not be necessary.

By establishing clear new administrative arrangements, a new act would address the other main problem facing employers and workers, that of fragmented administrative arrangements. With the continuation of fragmented administration, or the creation of a different type of fragmented administration, any gains made by a new single umbrella act will all come to nought.

The single new occupational health and safety organisation proposal in the ACOSH public discussion document consists of three parts - a tripartite commission, a "stand-alone" administrative and operational authority and a scientific and technical institute. I see no reason why such an administrative arrangement should not be put in place by the legislative reform process.

Perhaps the most contentious part of this proposal is the tripartite commission, but I believe this is a fundamentally important part of the whole reform process. Occupational health and safety is an issue which concerns employers, unions and government and is one where co-operation is important and perhaps more easily achieved than on some other issues. The government has already acknowledged the significance of tripartism in occupational health and safety by establishing ACOSH. However, there is apparently significant opposition to a tripartite commission within sections of government. In some cases, this is probably ideologically-defined in terms of inefficiency, accountability or anti-quango views. In other cases, opposition is more likely to be a dislike of having outside parties involved in the decision making process - so that government agencies can keep it all nice and cosy behind closed doors. To my mind, it is that attitude which is highly questionable on grounds of accountability.

It will also be said that ACOSH has been a failure and that this is an argument against tripartism. I would agree that ACOSH has been a failure but not because it is tripartite. It has been a failure because despite being described as the government's principal advisory body on occupational health and safety, it has either not been consulted or its recommendations ignored on a number of significant issues including the review of the Department of Labour and the transfer of occupational health staff from the National Health Institute to DSIR.

In addition, government departments have not felt constrained by the views of ACOSH and carried on doing their own thing. What this means is not that tripartism is a failure, but that a commission must have a status and authority that is recognised by statute and that the government representatives should represent a single agency and not several, each with its own objectives.

I started this section by talking about the legislation - Act - regulations - codes, and have expanded on the act. Regulations under the Act should deal with particular hazards and circumstances and prescribe standards for performance without going into technical detail as to how those standards should actually be achieved. It is in this area that the law would set minimum standards. This does not prevent, indeed it should encourage, individual workplaces operating to higher standards. Initially much of the detail which is at present contained in existing acts should be included in regulations under the new Act. I would then envisage that all the existing legislation - in the form of regulations under the new act - would be reviewed progressively, a priority having been established, to bring it in line with the new concepts.

Similarly, new codes of practice will need to be developed setting down recommended practices which can be followed in order to achieve the performance standards prescribed in the regulations. Such codes should not preclude other possible ways of achieving the desired performance. This system should thus allow flexibility for employers to achieve or exceed the required standard by whatever technical methods are appropriate and suited to their industry.

The system should allow for a move towards self-regulation where standards, procedures and practices are appropriate to a particular workplace and developed by those responsible for that workplace. In such circumstances, what is then required from the government agency is audit, not inspection. However, the legislative proposal must still provide for legally enforceable minimum standards - to do otherwise would give rise to inconsistencies and very real difficulties.

However, employers would welcome a move towards a government agency which places more emphasis on information and education rather than enforcement. This would require in general a higher standard of training and qualification from "the inspectorate" or whatever it might be called in the future.

The new act would deal with coverage, duties and rights of employers, designers, manufacturers, suppliers, contractors and employees, the new administrative arrangements, training, inspection and enforcement, offences and penalties and transitional arrangements.

Having given an indication of what I consider would be an appropriate way of

reforming the legislation I consider it essential to stress a number of points that employers do not want to see coming out of any legislative reform. In some ways this is not a good time for any further reforms, because so much has gone on in recent times that many employers - and not just employers I guess - just feel they cannot cope with any more. Certainly anything - rightly or wrongly - that would be perceived as increasing the costs of employment at the present time would not be welcome.

In this context, although it is accepted that there must be enforceable standards, requirements must not be set at uneconomically high levels. For example, it must be appreciated that there is no such thing as absolute safety or zero risk. Recognising that fact will bring us to the use of such terms as "reasonable" or "practicable" and there has been and no doubt will be considerable debate over the precise meaning of these terms. Employers certainly do not want to see reform of the legislation used as an excuse for placing extra unwarranted controls and restrictions on them. There is always the tendency for the lawmakers and bureaucrats to want to push through a few little extras. It should be remembered that the objective of this reform is the simplification of the legislation and the bureaucracy, not an excuse for more.

It is important in this context that any new act does not contain prescriptive detail on any subject - this would negate the value of the act, be very difficult to change and have the effect of replacing one not very good set of laws with another. Employers want to see consistent standards applied and where appropriate these standards to be enforced in an equitable manner. In this respect employers do not want to see local or regional variations in standards or quality of enforcement - and especially not the situation where a particular standard can be arbitrarily tightened at local level. Consistent nationally set and enforced standards are appropriate.

Employers do not want to see legislation giving what might be termed as "extra rights" to employees - they would certainly regard that as a negative outcome of the reform process. I will come back to this issue shortly because I want to discuss the code of practice for health and safety representatives and committees.

Employers do not want to see reform as an excuse for putting in another layer of bureaucracy. Some have commented that the proposal for the commission, authority and institute is just that. I don't believe that it is, but certainly reform of the bureaucracy is a major part of this exercise. If done properly I believe everyone has something to gain, public servants, employers and employees - but what we want is not more bureaucracy but better bureaucracy.

Perhaps most importantly of all, employers do not want to have to carry the financial costs of the reform. Any suggestion that a new authority and institute should be funded by a levy on employers would be totally unacceptable. There was of course no mention of such a move in the ACOSH discussion document which envisaged any transitional costs more or less being covered by the saving from the avoidance of duplication. However, it is fashionable at the moment to attempt to push costs for all manner of things on to employers. All this serves to do is increase the cost of employment or to put it even more bluntly it would put more people out of work, because employers just cannot afford extra levies - effectively levies on employment.

It would be quite irresponsible of the government if it were to seek to pass costs over onto employers in this way - irresponsible both because of the cost to employment, and irresponsible because the government would be ducking its own obligations. In any case, the application of a flat-rate levy, if such should be applied, would not act as any incentive to employers to put more investment into occupational health and safety. As with the proposal for a flat-rate ACC levy system, there is no economic signal to good or poor performers to provide an incentive - it's just another tax on employers and employment. I don't think arguments about the cost of ACC levies relative to overseas costs are relevant in this context - the fact is that employers cannot bear any extra levies in this regard.

I have another concern at the moment as well. With the talk of new acts, commissions and authorities, levies, enforcement - all very important - somehow people

seem to get left out, and after all occupational health and safety is about people - and that means we're talking about health as well as safety - so don't let's forget the occupational health side - people matter not just nuts and bolts.

One issue that is always raised when legislative reform of occupational health and safety is discussed is the status of the code of practice for health and safety committees. It is inevitable I suppose that people see that issue and the issue of reform as being closely linked and indeed many even confuse the two. However, I believe we are dealing with two quite separate issues here.

I believe the appropriate legislative and administrative reforms should go ahead in any case, quite independently of what may or may not happen about the status of the code of practice. If the type of enabling legislation that I have already described is enacted, then the code would retain its existing status until such time as government wishes to alter it. In that way the two issues would not be confused.

It will not come as any surprise, I'm sure, when I say that employers do not want to see the code of practice become mandatory or be transformed into regulations. This is not because employers do not want employee involvement in workplace health and safety issues. On the contrary, as I have already said workplace health and safety is an issue that involves everyone. The Employers Federation supports the concept of employee participation on a voluntary basis. So why don't we want it to be mandatory? Simply because making the code mandatory will not improve health and safety performance. Indeed it could be counterproductive, not least because of some of the present provisions in the code.

While the relationship between employer and employee is extremely important as far as occupational health and safety is concerned, the development of that relationship will be best achieved by education and training and not by compulsion. Compulsion simply is not conducive to co-operation. Every workplace is different - different industries, different hazards, different sizes both in terms of workforce and location, different structures, different 'cultures' - no one procedural approach will suit all workplaces. Each workplace should be encouraged to establish systems appropriate to its circumstances. Frankly, rigid structures and legislatively imposed procedures are in fact a disincentive to real progress and may set back genuine gains that have been made under a voluntary system.

The parts of the code that have concerned employers most have been those dealing with "rights" of health and safety representatives whereas others tend to view these aspects as the crux of the code. However, the plain fact is that a system which grants rights but no corresponding responsibilities or accountabilities will fail. So by all means let us encourage employee involvement in occupational health and safety issues but as a voluntary and co-operative arrangement between employers and employees at the workplace level without requiring outside involvement. Real co-operation at workplace level together with the right environment at national level can provide conditions where real progress can be made in reducing the number of workplace accidents and injuries.

In summary then, we can say that there is a strong case for reform of the legislation and administrative processes governing occupational health and safety in New Zealand. The need is for a single, non-prescriptive enabling act together with regulations and codes of practice as appropriate. New legislation should set in place a new administrative system comprising a tripartite commission, stand-alone authority and scientific and technical institute. Employee participation at workplace level should be strongly encouraged on a flexible, voluntary basis.